UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS
BOARD REGION 8

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.	
And	**CASE 08-CA-152192**
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982, AFL-CIO	

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO ADMINSTRATIVE LAW JUDGE ERIC FINE

Pursuant to Section 102.42 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel, Noah Fowle, respectfully files this brief with the Honorable Eric Fine, Administrative Law Judge, who heard the evidence in this matter on December 3 and 4, 2015 in Bowling Green, Ohio and on January 20, 2016 in Fostoria, Ohio. Counsel for the General Counsel will set forth the operative facts and legal theories upon which he relies to sustain the allegations contained in the Complaint and made on the Record.[1]

Respectfully submitted,

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[1] Midwest Terminals of Toledo International, Inc. will be referred to as Respondent. The International Longshoremen's Association, Local 1982, AFL-CIO will be referred to as the Union. References to the official transcript of this proceeding will be referred to as Tr._. General Counsel's exhibits will be referred to as G.C. Exh._. Respondent's exhibits will be referred to a R. Exh. _. Joint Exhibits will be referred to as Jt. Exh. _.

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I. INTRODUCTION

This matter comes before the Administrative Law Judge as a result of a Complaint and Notice of Hearing issued by the Regional Director of Region 8 on August 28, 2015, alleging that Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended. G.C. Exh. A(e).

At the hearing, Counsel for the General Counsel elicited testimony and submitted evidence showing that during March 2015, Respondent issued handbooks to its employees containing overbroad work rules, which were unilaterally promulgated, changed and implemented without providing the Union with notice and an opportunity to bargain over the work rules, handbook provisions and operating policies. The work rules and handbook provisions impact the employees' terms and conditions of work, and are thus mandatory subjects of bargaining and are material, substantial and significant. Accordingly, Respondent had an obligation to give the Union notice and the opportunity to bargain over the changed work rules, handbook provisions and operating policies.

Several rules contained in the March 2015 Policy Handbook, including the Policy Handbook Nondisclosure/Confidentiality Policy #2500; the Confidentiality Agreement Policy #2550; the Camera, Cell, Digital Device Policy #3100; and the Workplace Environment Policy #4500, as well as a number of rules contained in the 2015-2016 Safety Handbook, including the Incident Reporting Policy #1600; the Driver Safety Requirement; and the Visitor Safety Requirement are overly broad and can reasonably be interpreted to prohibit employees from engaging in protected activities in violation of Section 8(a)(1) of the Act.

II. ISSUES PRESENTED

1. Whether the bargaining unit description in the collective bargaining agreement is accurate and has remained unchanged since at least 2006.
2. Whether Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally changed the 2015-2016 Policy Handbook's Nondisclosure/Confidentiality Policy #2500 and its Camera, Cell, Digital Device Policy #3100 without providing notice and an opportunity to bargain to the Union.
3. Whether Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Driver Safety Requirement and Visitor Safety Requirement policies without providing notice and an opportunity to bargain to the Union.
4. Whether Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally promulgated and implemented a new 2015-2016 ILA Standard Operating Procedures policy without providing notice and an opportunity to bargain to the Union.
5. Whether Respondent violated Section 8(a)(1) of the Act by maintaining the following rules contained in the 2015-2016 Policy Handbook: (1) Nondisclosure/Confidentiality Policy #2500; (2) Confidentiality Agreement Policy #2550; (3) Camera, Cell, Digital Device Policy #3100; and (4) Workplace Environment Policy #4500.
6. Whether Respondent violated Section 8(a)(1) of the Act by maintaining the following rules contained in the 2015-2015 Safety Handbook: (1) Incident Reporting Policy #1600; (2) Driver Safety Requirement; and (3) Visitor Safety Requirement.

III. FACTS

A. Respondent's Business Operations

Respondent operates an international marine cargo dock, maintains warehouses, and distributes cargo by vessel, rail, and truck. Tr. 280, 285, 287-288. Respondent employs approximately twenty to forty employees at its facility, subject to the volume of available work, to perform stevedoring, warehouse and cargo work. Tr. 41, 285.

Terry Leach has been the Director of Operations at the Respondent's facility since 2007. Tr. 38, 39, 382. Leach's duties include negotiating contracts, overseeing the workforce, and ensuring compliance with safety regulations. Tr. 382. Christopher Blakely has been Respondent's Human Resource manager since May 2010. Tr. 285, 315. Blakely, who reports directly to Leach, is responsible for personnel matters, contract negotiations, and grievance processing. Blakely is also authorized to sign negotiated policies. Tr. 289.

B. The Union and Its Representatives

The International Longshoremen's Association, Local 1982, represents employees of the Respondent. Tr. 41. Prentis Hubbard, a current employee of the Respondent, is the Union's Vice President. Tr. 169. Hubbard also serves as the Financial Secretary, a Dock Steward, and serves as a member of both the Union's safety committee and bargaining committee. Tr. 170. Hubbard regularly attended contract negotiations between the Parties from 2012 through 2015. Tr. 194. Otis Brown is the Union President and was employed by Respondent from October 2001 until his termination on or about October 1, 2013.[2] Tr. 216. Andre Jordan served as a

[2] Administrative Law Judge Paul Bogas found that Brown's termination violated Section 8(a)(1) and (3) of the Act. *Midwest Terminals & Longshoremen ILA, Local 1982*, 2016 WL 275278 (Jan. 21, 2016); *see also, Midwest Terminals*, 362 NLRB No. 57 (2015) (finding Respondent bore animus against Brown because of his protected activities and unlawfully discriminated against him on that basis by denying him regular work assignments and light duty work assignments in violation of Section 8(a)(1) and (3) of the Act).

trustee for the Union and participated in contract negotiations on behalf of the Union in 2011. Tr. 106, 108. Juan "John" Rizo is an employee of the Respondent, a member of the Union, but he is not a Union officer, and he does not have the authority to represent the Union. Tr. 179, 181, 219, 426-427.

C. The Bargaining Relationship and Unit Employees

Respondent and the Union have a bargaining history dating back to 2004, when the Respondent took over the current facility and first recognized the Union. Tr. 29, 39, 288. The Respondent and the Union entered into a collective bargaining agreement in 2006 that expired on December 31, 2010. Tr. 106; Jt. Exh. A. The Union represents the following employees, as set forth in the most recent collective bargaining agreement:

> [E]mployees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, fork-lift operators, end-loaders, material handlers, checkers, signalmen, winchmen, linemen, line dispatcher, and hatch leaders.[3]

D. The Unit Description From the Parties' Last Negotiated Agreement is Appropriate

While Respondent denies the unit description in its Answer,[4] it presented no evidence to support its denial. The record clearly demonstrates that the unit description has remained unchanged as set forth in the 2006-2010 collective bargaining agreement at Section 1, which contains the definition of the "members of the collective bargaining unit." Jt. Exh. A, Section 1, Definitions. The recognition clause in the contract states, in pertinent part, that "the Company hereby recognizes the International Longshoremen's Association, Local 1982, AFL-CIO, as the exclusive collective bargaining agent for all employees who are covered by this Agreement…" Jt. Exh. A, Section 2, Recognition. Hubbard testified that the bargaining unit set forth in the

[3] Jt. Exh. A. 1. Definitions; *see also* Tr. 171-172, 290-291.

[4] G.C. Exh. A(g).

contract is unchanged and has not changed since Hubbard's employment began in 2006. Tr. 172-173; Jt. Exh. A. Brown also testified that the unit description has not changed since the execution of the expired contract in 2006. Tr. 220. Even Respondent's witness, Blakely, admitted that the unit description contained in the 2006-2010 collective bargaining agreement is an accurate description of the unit. Tr. 291-292.

Any argument that Respondent might make that the Board's work award in *Teamsters Local 20 & Midwest Terminals & Longshoremen ILA Local 1982*, 359 NLRB No. 107 (2013) has changed the unit description is belied by the decision itself, as well as Blakely's testimony that while the Teamsters were awarded certain work, no positions were removed from the unit at issue here. Tr. 373. In that case, as a result of a Section 10(k) hearing, the Board apportioned work between the Union and the International Brotherhood of Teamsters, Local 20, ("Teamsters") by dividing "wet" dock work and "dry" dock work. In the absence of any evidence to support Respondent's denial of the unit description, it is respectfully requested that the unit description as plead in the Complaint be found to accurately describe the unit.

E. The Respondent Unilaterally Changed Its Handbooks, Work Rules and Policies

Beginning in 2010, Respondent started requiring employees to attend mandatory safety meetings at the beginning of each shipping season. Tr. 23, 44, 102. The Respondent has utilized the safety meetings to distribute information to employees about the upcoming shipping season. Tr. 44-45, 173-174.

Upon the expiration of the 2006 collective bargaining agreement, the Parties commenced negotiations for a successor agreement in 2011. Tr. 108. During negotiations, the Union, by Jordan, drafted and proposed an employee handbook which was presented to Leach and Blakely. Tr. 109, 113-114, 120-121; G.C. Exhs. F and G. In the course of negotiations, the Parties

bargained over work rules, including the visitor policy and the cell phone policy. Tr. 114, 116, 118-119; G.C. Exhs. J and L. The Parties reached a temporary agreement on contract terms, as well as the visitor policy and the cell phone policy. Tr. 126; G.C. Exh. H.

Union Vice President, Dock Steward and Financial Secretary Prentis Hubbard testified that at the 2013 safety meeting, the Respondent distributed safety rules to employees without providing a copy to the Union or negotiating the contents of the rules in advance. Tr. 173-174. Cleophas Fisher, Jr., an employee of the Respondent, testified that at that same safety meeting, Hubbard, in the presence of Respondent's representatives Leach and Blakely, announced that employees should sign for the handbook under protest. Tr. 99-100.

Union President Otis Brown testified that he attended the mandatory safety meeting in 2014. Tr. 228. Brown testified that the Respondent did not give the Union any notice concerning any manuals that were going to be handed out at that meeting. Tr. 228. As a result, on September 18, 2014, the Union filed an unfair labor practice charge alleging that the Employer violated Section 8(a)(1) and (5) of the Act by disseminating changes to work rules, a mandatory subject of bargaining, without notifying or bargaining over those changes with the Union. Tr. 241, 380; G.C. Exh. K.

The Respondent stated in its position statement to that charge that it made no changes to the Safety Handbook and CBA Work Rules distributed on March 22, 2014. G.C. Exh. N, p.7-8. Significantly, however, Respondent's representative Blakely contradicted that position by testifying in the instant proceeding that Respondent did in fact make some changes to the handbooks it distributed at the 2014 mandatory safety meeting without notifying the Union. Tr. 379-380.

At the March 2015 mandatory safety meeting, the Respondent distributed its Policy

Handbook, Safety Handbook, and the new 2015-2016 ILA Standard Operating Procedures to employees. Tr. 100. Prior to the March 2015 meeting, the Respondent never maintained an ILA Standard Operating Procedures. The record evidence shows that the 2015-2016 ILA Standard Operating Procedures handbook was created and distributed as a result of a March 2014 OSHA determination. Tr. 435. The 2015-2016 ILA Standard Operating Procedures details the required equipment, training, personal protective equipment and emergency response plan for the loading and unloading of materials. In addition, the manual delineates mandatory job steps and safety rules in performance of each job.

Having not received a copy of the policy manuals in advance of the safety meeting, the Union was unaware that the 2015-2016 Safety Handbook and the 2015-2016 Policy Handbook contained new rules and expanded rules until the handbooks were passed out. Hubbard again instructed union members to sign for the handbooks under protest because Respondent failed to provide the Union with copies prior to the meeting. Tr. 101, 176. On March 20, 2015, the Union sent the Respondent a letter demanding bargaining over the changes. Tr. 221-222; G.C. Exh. B. Respondent has refused to bargain with the Union over the policy manuals. Tr. 232-234.

IV. RESPONDENT MADE UNILATERAL CHANGES TO MANDATORY SUBJECTS OF BARGAINING

An employer is prohibited from making changes to employees' terms and conditions or work without providing the employees' bargaining representative with a reasonable and meaningful opportunity to discuss those changes. Such a unilateral change "is circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). A unilateral change is unlawful only if is material, substantial and significant. *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (threat to impose discipline for failing to follow a rule requiring advance notice for use of sick leave was sufficient

to show the change to be significant). An employer may not make a unilateral change to a term or condition of employment before reaching a good-faith impasse in bargaining, and "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

A. The Additions to Respondent's Handbooks Distributed to Employees at the March 2015 Mandatory Safety Meeting Constituted Mandatory Subjects of Bargaining

The Respondent issued three separate handbooks at its March 2015 mandatory safety meeting: the 2015-2016 Policy Handbook, the 2015-2016 Safety Handbook, and the new 2015-2016 ILA Standard Operating Procedures. It is well-settled Board law that work rules, particularly those that involve the imposition of discipline constitute a mandatory subject of bargaining. *Toledo Blade*, 343 NLRB 385 (2004). Violation of the work policies at issue in the Policy Handbook and Safety Handbook here are grounds for discipline, including termination, and are mandatory subjects of bargaining. Furthermore, the Board has long held that workplace safety is a mandatory subject of bargaining. *Castle Hill Health Care Ctr.*, 355 NLRB 1156 (2010); *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000); *Minnesota Mining & Mfg, Co*., 261 NLRB 27, 29 (1982), *enfd*. 711 F.2d 348 (D.C. Cir. 1983). Pursuant to a 2014 OSHA settlement, Respondent created the 2015-2016 ILA Standard Operating Procedures, which addresses the process for the safe unloading and loading of vessels. Implicit in the 2015-2016 ILA Standard Operating Procedures handbook descriptions for the various job steps is that employees will "comply with CBA Work Rules…and 1725 Marine Terminal Safety Policy (the Safety Policy Handbook). Jt. Exh. D. Therefore, the 2015-2016 ILA Standard Operating Procedures handbook is a mandatory subject of bargaining.

The Changes are Material Substantial and Significant

The Respondent's expansion of the rules in the Policy Handbook, Safety Handbook, as well as the implementation of the ILA Standard Operating Procedure Handbook, increased employees' exposure to discipline or even termination in the event that they ran afoul of the revised policies.

As noted above, Respondent has never had an ILA Standard Operating Procedures Handbook in place. The ILA Standard Operating Procedures Handbook states that employees must comply with certain provisions of the Safety Policy Handbook. Jt. Exh. D at P. 2. Marine Terminal Safety Policy #1725, contained in the 2015-2016 Safety Handbook, states that "failure to abide by this policy will result in disciplinary action." Jt. Exh. C at P. 54.

The Nondisclosure/Confidentiality Policy #2500 from the 2015-2016 Policy Handbook contains expanded prohibitions on photography and all types of recording, requiring permission from the director of operations, whereas the rule from the 2014-2015 Policy Handbook did not require such permission nor did it cover photography or any type of recording. *See* Jt. Exh. B and E. The Respondent also expanded the prohibitions in its 2015-2016 Policy Handbook version of the Camera, Cell, Digital Device Policy #3100. The Workplace Environment Policy #4500 from the 2015-2016 Policy Handbook added "violating others' expectation of privacy" to the list of mandatory terminable offenses. Jt. Exhs. B and E.

The Incident Reporting Policy #1600 in the 2015-2016 Safety Handbook requires that "[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO." Jt. Exh. C. In addition, both the Driver Safety Requirements and the Visitor Safety Requirements in the 2015-2016 Safety Handbook prohibit photography and recording at Respondent's facility at any time. *Id.*

Respondent's 2014-2015 Safety Handbook had no prohibitions on photography and recording, nor did it have any driver safety requirements or visitor safety requirements.

The record evidence shows that the amended rules in the Policy and Safety Handbooks, and the new ILA Operating Procedures Handbook, include additional prohibitions that, if breached, subject employees' to disciplinary action. There can be no dispute that these changes are material, substantial and significant. See *Postal Service*, 341 NLRB 684, 687 (2004).

B. Respondent Failed to Provide the Union Notice or an Opportunity to Bargain

The Respondent's failure to give the Union notice and an opportunity to bargain undermines the Union's primary purpose to represent employees' interests concerning their terms and conditions of work. The Union learned about the new operating policy and the amended rules when Respondent distributed the handbooks to its employees. At the same meeting, Respondent required that employees sign and acknowledge their receipt of the handbooks and their acceptance of the terms contained within the handbooks.

In *Katz*, the Supreme Court held that "unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. In the instant case, the Respondent had a duty to afford the Union with notice and a meaningful opportunity to bargain over the changes it implemented when it issued the three handbooks to employees. "An employer must inform a union of its proposals under circumstances which at least afford a reasonable opportunity for counter arguments or proposals." *Defiance Hospital*, 330 NLRB 492 (2000), *citing NLRB v. Centra*, 954 F.2d 366 (6th Cir. 1992).

There is no record evidence that Respondent made any effort to give the Union notice or

any opportunity to bargain over the handbook policies prior to the distribution of the handbooks to employees. In fact, Respondent's own HR manager, Blakely, testified that he never gave out copies of the handbooks prior to the March 21, 2015 mandatory safety meeting, and that it was his practice to hand deliver the books to employees at the commencement of the meeting. Tr. 295- 296. Respondent's representative Leach testified that the only person he provided notice of his work on the 2015-2016 ILA Standard Operating Procedures prior to the March 2015 safety meeting was Juan Rizo,[5] a Union member with no official position in the Union. Tr. 79-80. Union member Cleophas Fisher testified that he attended the mandatory safety meeting in March 2015, and that Hubbard instructed members to sign for the handbooks under protest due to the lack of notice to the Union. Tr. 100. Hubbard also testified that he made that announcement at the March 2015 mandatory safety meeting. Tr. 101, 176.

Furthermore, Leach admitted that he did not bargain with the Union over the Safety Handbook, nor did he provide advance notice to the Union about the Safety Handbook. Tr. 82-84. The Respondent, in derogation of OSHA's directive to work with the Union, unilaterally created the 2015-2016 ILA Standard Operating Procedures. The handbook contains multiple safety rules that the Union never saw prior to the distribution of the policy. Hubbard testified that he never saw the Respondent's 2015-2016 ILA Standard Operating Procedures, an entirely new handbook, prior to the March 2015 mandatory safety meeting. Tr. 178.

The record evidence is undisputed that the Respondent provided the Union with no notice of the changes to the Policy Handbook and the Safety Handbook or of the creation of the ILA Standard Operating Procedures manual. It is implicit with the lack of notice, that

[5] The only evidence at trial of Rizo's role in the Union is that of a member. Tr. 179, 181, 219, 426-427. Respondent failed to produce, and no evidence exists, that Rizo had the authority to bind the Union to any agreements or that he is an agent of the Union and notice to him provides notice to the Union.

Respondent failed to give the Union the opportunity to bargain over these changes. The unilateral changes violate Section 8(a)(1) and (5).

C. Respondent Cannot Rely on its Past Practice and Waiver Arguments Raised at the Hearing

At the hearing, Respondent raised an affirmative defense that the Union waived its right to bargain over changes to the policy handbooks. Yet the Respondent offered no evidence to support its argument.

Any claimed waiver of a right to bargain concerning mandatory subjects of bargaining must be based on evidence of a clear and unmistakable waiver. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). It is a well-established rule that a waiver of a statutory right is not lightly inferred. "Rather, such waiver will be found only where the Union has, by clear and unmistakable language, expressed a conscious intent to relinquish such rights." *Hercules Inc.*, 281 NLRB 961, 964 (1986). Absent specific contract language, an employer must show that the issue was "fully discussed and consciously explored" and that the Union "consciously yielded" its interest in the matter. *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529, 1530 (2000), *citing Metropolitan Edison Co., supra*. "Silence does not constitute a clear and unequivocal manifestation of the Union's intention to waive its right to complain about such action." *Allen W. Bird II, Receiver for Caravelle Boat Co.*, 227 NLRB 1355, 1358 (1977). Moreover, the Board has held that past issuance of rules without objection by or request for bargaining on the part of the union does not constitute a waiver of the right to bargain. *Miller Brewing Co.*, 166 NLRB 831 (1967), *enfd*. 408 F.2d 12 (9th Cir. 1969). A "union's acquiescence in previous unilateral changes does not operate as a waiver of its rights to bargain over such changes for all time." *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993), *quoting Owens-Corning Fiberglass*, 282 NLRB 609 (1987).

The Respondent's only attempt to establish its waiver argument relies on Leach's testimony that he shared his work on the 2015-2016 ILA Standard Operating Procedures with employee Juan Rizo. Tr. 79. Yet, there is no evidence that Rizo holds any position with the Union or was the Union's agent, actual or apparent. There is no evidence to support the contention that Rizo's knowledge of Leach's work on the procedures manual was sufficient notice to the Union to find a waiver. Tr. 179, 181, 219, 426-427.

Moreover, any argument that Respondent might make the Union waived its right to bargain over the work policies based on past practice is unsubstantiated. The record is devoid of evidence of the Union's acquiescence to changes to work policies. Instead, all the evidence shows that the Union has continually objected to the Respondent's unilateral changes to the policy handbooks issued to employees. The Union has instructed its members to sign for the handbooks under protest at the 2013, 2014 and 2015 mandatory meetings. Tr. 173-174, 176. The Union also filed unfair labor practice charges in both 2014 and 2015 alleging the policy manuals to be unlawful unilateral changes, which rebuts an inference of any waiver.[6] In 2015, the Union demanded bargaining over the changes. The Union was not silent in the face of these changes, nor did the Union make any express and explicit waivers of its right to bargain over them.

The Respondent cannot rely on an argument that Union waived its right to bargain over the handbooks based on past practice, no more than it can rely on the management rights clause contained in the expired collective bargaining agreement. A waiver of bargaining rights contained in a contractual management-rights provision is limited to the time that the contract is in effect, and a contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the Parties' contrary intentions. *Beverly*

[6] R. Exh. M. *See also PRC Recording Corp.*, 280 NLRB 615, 636 (1986).

Health and Rehabilitation Services, Inc., 346 NLRB 1319, 1353 (2006); *Long Island Head Start*, 345 NLRB 973 (2005), *enf. denied* 460 F.3d 254 (2d Cir. 2006). The Parties are operating under the terms of an expired agreement that was effective from January 1, 2006, through December 31, 2010. Tr. 106; Jt. Ex. A. Thus, the Employer cannot rely on the management rights clause to show that the Union waived its right to bargain following the expiration of the agreement. Respondent did not present evidence at the hearing that the Parties agreed to extend the management rights clause. While the Parties' Temporary Agreement, reached on January 1 2011 and expired on December 31, 2012, contained a management rights clause, the agreement failed to expressly extend the authority of that clause past the expiration of the agreement itself. G.C. Exh. H. Any arguments presented by Respondent that the expired management rights clause permitted it to unilaterally implement handbook policies must be rejected.

The Respondent issued its handbooks at the March 21, 2015 mandatory safety meeting that contained changes to terms and conditions of employment. The Respondent failed to provide any notice or meaningful opportunity to bargain to the Union over those changes. Respondent's unilateral changes to the Policy Handbook and Safety Handbook and its promulgation of the ILA Standard Operating Procedures Handbook violate Sections 8(a)(1) and (5) of the Act.

V. RESPONDENT'S WORK RULES VIOLATE SECTION 8(a)(1)

It is well-settled that even if a rule does not explicitly restrict protected activity, a rule will be found to violate Section 8(a)(1) where: (1) employees would reasonably construe the language to prohibit protected activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of protected rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The mere presence of overly broad rules reasonably tends to discourage employees from engaging in protected activity that they could

reasonably believe to be encompassed by the rules, regardless of the Respondent's motives or enforcement history. *Id.* at 650.

Respondent has maintained both the 2015-2016 Policy Handbook and the 2015-2015 Safety Handbook. Contained within the Policy Handbook are the Nondisclosure/Confidentiality Policy #2500, the Confidentiality Agreement Policy #2550, the Camera, Cell, Digital Device Policy #3100, and the Workplace Environment Policy #4500. The Safety Handbook includes the Incident Reporting Policy #1600, the Driver Safety Requirement, and the Visitor Safety Requirement. All of these policies are overbroad as they can reasonably be construed by employees to prohibit protected activities and should be found to violate Section 8(a)(1).

A. The Rules at Issue Are Maintained Within the 10(b) Period

There is no dispute that Respondent's handbooks are currently being maintained. The record evidence shows that the Respondent distributed the handbooks to employees at the beginning of the shipping season in March 2015. Tr. 294. The mere maintenance of a facially overbroad policy during the Section 10(b) period violates the Act even if the rule was promulgated outside the six-month limitations period and has not been enforced. *Ivy Steel & Wire, Inc.*, 346 N.L.R.B. 404, 422 (2006); *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 186 (2000); *Alaska Pulp Corporation*, 300 NLRB 232, 233 (1990). It is undisputed that Respondent maintained its unlawful rules during the 10(b) period. Therefore, any defense raised by the Respondent in its Answer (G.C. Exh. A(g)) that the maintenance of the rules at issue falls outside the statutory limitations of Section 10(b) of the Act must fail.

B. Policy Handbook's Non-Disclosure / Confidentiality Policy #2500 is Unlawfully Overbroad

This rule provides that employees, who improperly use or disclose trade secrets or confidential business information, including information regarding labor relations, are subject to

discipline. Without appropriate limitations, the Board finds such confidentiality rules to be unlawful. *Cintas Corp.*, 344 NLRB 943 (2005); *compare to Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) (finding that Employers have a legitimate interest in maintaining the confidentiality trade secrets, contracts with clients, and a range of other proprietary information); *Super K-Mart*, 330 NLRB 263, 263 (1999) (upholding an employer's legitimate confidentiality rules that do not restrict employees' Section 7 rights). The Board also finds that ambiguous confidentiality rules unlawful. *Cintas Corp.*, *supra*; *see also Valley Health Sys. LLC*, 2015 WL 1254854 (2015) ("The problem with Respondents' confidentiality policy is that the terms are ill-defined."); *and Muse Sch. Ca*, 2014 WL 4404737 (2014).

Respondent's rule provides that marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such. Such a rule goes beyond protecting an employer's legitimate business interests and may be reasonably interpreted to prohibit employees' Section 7 rights.

In *Lily Transp. Corp.*, 362 NLRB No. 54 (2015), the Board affirmed the administrative law judge's decision that a rule prohibiting the disclosure of information maintained in confidential personnel files limited employees' ability to discuss wages and other terms and conditions of employment. Similarly, in *U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001), the Board held that rules defining personnel records as confidential to be unlawful. Furthermore, the Board has also held a confidentiality rule to be unlawfully overbroad where it designates personnel file information and labor relations information to be confidential because a reasonable employee could read the rule to prohibit employees from discussing union matters. *Sheraton Anchorage*, 359 NLRB No. 59 (2013) *upheld by Remington Lodging & Hosp., LLC*,

362 NLRB No. 123 (June 18, 2015).

Respondent's rule is unlawful as it prohibits the discussion of labor relations, one of the core activities protected by Section 7 of the Act. Moreover, employees could reasonably interpret this confidentiality policy restricts their rights to discuss wages, benefits and other terms and conditions of employment with non-employees or union representatives.

C. The Policy Handbook's Confidentiality Agreement Policy #2550 is Unlawfully Overbroad

The policy requires employees to certify that they will maintain the confidentiality of "ALL documents, credit card information, and personal information of any type." Jt. Exh. B (emphasis in original). The Board found a similar rule that prohibited employees from sharing "[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers or employee personal health information" to be unlawful. *Costco Wholesale Corp.,* 358 NLRB No. 106 (2012). In that case, the Board held that "[E]mployees are entitled to use for organizational purposes information and knowledge that comes to their attention in the normal course of their work activity but are not entitled to their employer's private or confidential records." *Id.* The Board noted that while the rule referred to certain items that do not implicate Section 7 rights such as "confidential financial," "credit card numbers," "social security numbers," or "employee personal health" in the same sentence as "payroll," an employee could reasonably construe the rule to prohibit the sharing of payroll information. *Id*.

The Board has also found that a rule that prohibited employees from revealing confidential information about customers and fellow employees to be too ambiguous and thus unlawful. *Flamingo Hilton-Laughlin,* 330 NLRB 287 (1999). Here, Respondent's all-encompassing rule can be reasonably interpreted to prohibit sharing even the most basic personal information. While the policy also prohibits the sharing of credit card information, "all

documents" and "personal information of any type" are overbroad and can be reasonably read to to prohibit employees Section 7 activity.

D. Policy Handbook's Camera, Cell, Digital Device Policy #3100, and Safety Handbook's Driver Safety Requirement and Visitor Safety Requirement Are Unlawfully Overbroad

Three of Respondent's policies, the Policy Handbook's Camera, Cell, Digital Device Policy #3100 and the Safety Handbook's Driver Safety Requirement and Visitor Safety Requirement, unlawfully restrict photographs, recordings and/or video recordings. Camera, Cell, Digital Device Policy #3100 prohibits employees from taking photographs or recordings on any digital devices without authorization, and extends to use of devices for documentation or investigation purposes. The Driver Safety Requirement and the Visitor Safety Requirement prohibit photography and recording at all times, and state that if photographs and videos are taken by employees or visitors on the facility property, they become the property of the Respondent. The policies prohibit sharing or distributing photographs and recordings in any forum, including video sharing applications and social media outlets. In addition, employee use of cell phones to send email is expected to comply with company rules and policies including ethics, code of conduct and confidentiality.

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. *See White Oak Manor,* 353 NLRB 795, fn. 1. (2009), *incorporated by reference* 355 NLRB 1280 (2010), *enforced mem.,* 452 F. App'x 374 (4th Cir. 2011). Rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time. See *Whole Foods Market, Inc.,* 363 NLRB No. 87 (2015). Respondent's Camera, Cell, Digital Device Policy

#3100, the Safety Handbook's Driver Safety Requirement and the Visitor Safety Requirement do not qualify the prohibitions on photographs and/or recording, and the use of personal cameras or recording devices. While the Board has upheld rules that appropriately limit employees' recording or photography in the context of protecting patient privacy, Respondent has presented no legitimate basis to restrict employees from photographing or recording. *See Flagstaff Medical Center*, 357 NLRB No. 65, (Aug. 26, 2011). *See also, Caesar's Entertainment d/b/a Rio All-Suites Hotel and Casino*, 362 NLRB No. 190 (Aug. 27, 2015). Respondent's policy is littered with prohibitions on the use of personal devices, and provides no appropriate limitations. While the preface of the policy seeks to "prevent the improper discloser (sic) of company trade secrets and confidential business information," it remains too to rise to the level of a legitimate business justification, especially given that the details of the policy go on to require all photography and recording be completed at the direction of the Facility Security Officer or his designee. Jt. Exh. B. In *Whole Foods, Inc*., supra at 5, the Board distinguished the weighty interest in protecting patient privacy interests and an employer's HIPAA obligations as raised in *Flagstaff Medical Center* from privacy interests of employees when it found the unqualified restriction on recording conversations to be unlawfully overbroad in violation of Section 8(a)(1). The blanket restrictions on the use of digital devices can reasonably be read to prohibit employees Section 7 activity and violates Section 8(a)(1) of the Act.

E. Policy Handbook's Workplace Environment Policy #4500 is Unlawfully Overbroad

The Respondent's Policy Handbook - Safe Workplace Environment Policy #4500 subjects employees participating in a number of listed activities to immediate discharge. One of those activities listed is "violating others' expectation of privacy." Jt. Exh. B at P. 44. Another listed activity that is prohibited is "loitering or presence on the jobsite without authorization

before or after assigned shift is completed." *Id*. The prohibitions, however, are not accompanied by a definition.

The handbook fails to provide any definition or context for what is private, and the Board also finds that type of ambiguity in a work rules unlawful. *Cintas Corp.*, *supra*; *Valley Health, supra; and Muse, supra*. The Board has also found that rules prohibiting employees from discussing "private matters of members and other employees" to be unlawful because the employer's definition of "private" included terms and conditions of employment. *Costco Wholesale Corp.,* 358 NLRB No. 106 (2012). Respondent's rule does not define what it seeks to keep private, and the Board construes such ambiguities against the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999.)

The Board has also found "no loitering" policies to be ambiguous and thus unlawful. *Fiesta Hotel Corp*, 344 NLRB 1363, 1390 (2005). Similarly, the Board held in *Ark Las Vegas Restaurant*, 343 NLRB 1281 (2004) that loitering rules that apply to an employer's premises violate the Act. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 655 (2004), the Board found that a rule prohibiting "[l]oitering on company property (the premises) without permission from the Administrator" violated Section 8(a)(1) of the Act because it would reasonably chill employees in the exercise of their Section 7 rights. In so finding, the Board explained that "employees could reasonably interpret the rule to prohibit them from lingering on the [r]espondent's premises after the end of a shift in order to engage in Sec[tion] 7 activities, such as the discussion of workplace concerns." *Id*. at 649 fn. 16.

Respondent's Workplace Environment Policy #4500 similarly prohibits loitering. Thus, the present policy is likewise overly broad and ambiguous and a reasonably employee could interpret the rule to prevent them from engaging in Section 7 rights before or after work.

F. Safety Handbook's Incident Reporting Policy #1600 is Unlawfully Overbroad

The policy requires authorization by Alex Johnson, President and CEO, prior to disclosure outside of Midwest Terminals of incident reports or related documents involving incidents which involve hospitalization or a fatality that will likely lead to litigation. It specifies that such incident reports should be marked as privileged and confidential. Rules that prohibit employees from discussing terms and conditions of work because those issues may be the subject of an investigation are unlawfully overbroad because they reasonably tend to prohibit employees' Section 7 rights. *All American Gourmet*, 292 NLRB 1111, 1129-1130 (1989). *See also, Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) *affd. by Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015). The Board held that to justify a prohibition on employees' discussions of ongoing investigations, an employer must establish a legitimate business justification beyond a generalized concern to protect the integrity of the investigation that outweighs employees' Section 7 rights. *See, Hyundai American Shipping Agency, supra*. Moreover, a rule stating that any documents related to incidents or litigation is confidential would preclude employees from discussing NLRB and EEOC litigation and arbitrations and thus is an overly broad restriction on Section 7 rights. The Respondent's policy has a blanket confidentiality clause preventing employees from sharing information relating to incidents or litigation. Jt. Exh. C. P. 46. An employee could reasonably believe this rule prevents them from contacting their union or government agencies and thus is overly broad and restricts Section 7 rights.

VI. CONCLUSION AND REQUESTED REMEDY

On the basis of the entire record, particularly the facts referred to above, and the applicable law, it is requested that the Administrative Law Judge find that Respondent violated Section 8(a)(1) by maintaining unlawful work rules, and violated Sections 8(a)(1) and (5) by

unilaterally changing the policy and safety handbooks, and unilaterally promulgating the operating procedures without providing the Union notice or an opportunity to bargain.

Counsel for the General Counsel respectfully requests relief in the form of a cease and desist order revoking the new workplace safety rules in the 2015-2016 Safety Handbook; the 2015-2016 Policy Handbook Nondisclosure / Confidentiality Policy #2500; The 2015-2016 Policy Handbook Camera, Cell Digital Device Policy #3100; and the safety rules contained in the 2015-2016 ILA Standard Operating Procedures. Counsel for the General Counsel also requests that the following unlawful and / or overly-broad work rules be rescinded, and that the Employer post a Notice to Employees confirming that the rules have been rescinded:

Policy Handbook Nondisclosure/Confidentiality Policy #2500;

Confidentiality Agreement Policy #2550;

Camera, Cell, Digital Device Policy #3100;

Workplace Environment Policy #4500;

2015-2016 Safety Handbook's Incident Reporting Policy #1600;

Driver Safety Requirement; and

Visitor Safety Requirement

Counsel for the General Counsel further requests any and all other relief as may be just and proper to remedy the alleged unfair labor practices.

Dated at Cleveland, Ohio this 15th day of April, 2016.

Respectfully submitted,

/s/ Noah Fowle
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Division of Judges, and served by electronic mail on the following Parties, this 15th day of April, 2016:

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